EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

86 1674

No.

Supreme Court, U.S.
FILED
APR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILDRED HESTERMAN, EXECUTRIX OF THE ESTATE OF LEONARD HESTERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

James F. Matthews, Esq.
2 North Second St.#1400
San Jose, CA 95113
Telephone: (408) 998-4800

ISSUES PRESENTED

1. May the IRS foreclose the special estate tax lien arising under 26 U.S.C. Section 6324(a), which lien has a ten year duration, years, indeed, fifteen, twenty or thirty years after the expiration of the ten years, with no limitation of time, provided they gave a notice of levy on the person holding the property during the ten year period, or is the IRS required to forclose and obtain payment of the taxes within the ten year period before the lien lapses?

2. Does a levy by the I.R.S., without more, constitutes a sufficient perfection of a gift tax lien so as to abrogate the necessity for refiling the lien prior to the expiration of the six year statute of limitations provided for in 26 USC Section 6323(g)(3)(A), in order for the IRS to maintain its priority.

3. If petitioner, a purchaser of

personal property from a taxpayer, has possession of the property, may the IRS levy, seize and sell the property without regard to statutory requisites relating to the enforcement of a tax lien, simply because the purchase was, at one point in time, voidable? Doesn't the purchaser who is in possession of the property have the right to challenge the non-existence or non-priority of the liens?

PARTIES

The parties in this action are Chevron, U.S.A., Inc. United States of America, William H. Bazinett, individually; William H. Bazinett, as Executor of the estate of Katherine L. Bazinett; William H. Bazinett, as executor of the estate of Joseph Herbert Bazinett.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
1. Relief sought by the United States	2
2. Basis of government's claim	2
3. Factual background	3
4. Proceedings below	4
REASONS FOR GRANTING THE WRIT	6
I. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER THE SPECIAL ESTATE TAX LIEN IMPOSED BY 26 U.S.C. SECTION 6324(a) AUTOMATICALLY EXPIRES AFTER TEN YEARS IF NOT "SOONER PAID IN FULL", OR WHETHER A "NOTICE OF LEVY", WITHOUT SEIZING THE PROPERTY AND SELLING IT TO PAY THE ESTATE TAX, EXTENDS THE TEN YEAR PERIOD OF THE LIEN SO AS TO PERMIT FORECLOSURE WELL AFTER THE EXPIRATION OF THE TEN YEAR PERIOD	6
II. THE COURT SHOULD ISSUE A WRIT TO DETERMINE WHETHER LEVY BY THE I.R.S. ABROGATES THE NEED TO RE-FILE A GIFT TAX LIEN, PRIOR TO THE EXPIRATION OF THE SIX YEAR PERIOD PROVIDED FOR IN 26 U.S.C. SECTION 6323(G)(3)(A), IN ORDER TO MAINTAIN PRIORITY.	12

Page

III. THE COURT SHOULD GRANT REVIEW TO CONSIDER THE SERIOUS IMPLICATIONS OF THE COURT OF APPEALS DECISIONS, WHICH HOLD THAT THE GOVERNMENT CAN TAKE PROPERTY IN THE POSSESSION OF A PURCHASER, TO ENFORCE A LIEN AGAINST THE PURCHASER'S TRANSFEROR, WITHOUT SUFFICIENTLY PERFECTING ITS TAX LIENS, SO LONG AS THE PURCHASER WHO IS IN POSSESSION OF THE PROPERTY HAS A VOIDABLE TITLE, BECAUSE, IN THAT EVENT, THE PURCHASER IS "NOT ENTITLED TO CHALLENGE THE GOVERNMENT'S SUPERIOR INTEREST." 14

IV. REVIEW SHOULD BE GRANTED IN ORDER TO CORRECT FUNDAMENTAL ERRORS IN THE COURT OF APPEALS' DECISION WHICH MAKES FOR A VERY BAD PRECEDENT. 16

CONCLUSION 18

APPENDIX:

Decision of 9th Circuit Court of Appeals filed May 17, 1983 A-1

Decision of 9th Circuit Court of Appeals filed September 10, 1985 A-20

TABLE OF AUTHORITIES

Cases:	Page
American Acceptance Corp. v. Glendora Better Builders, Inc. 5 5 F.2d 1220 (9th Cir. 1977)	13,14
In re Swan-Finch Oil Corp. (DC N.Y. 1967) 279 F.Supp. 386	18
United States v. Whiting Pools, Inc. 462 U.S. 198 (1983)	10,11,14
U.S. v. Cleavenger 517 F.2d 230 (7th Cir. 1975)	6,12
Phelps v. United States 421 U.S. 330 (1975)	8,9
Statutes:	
26 U.S.C. 6323(g)(3)(A)	12,13
26 U.S.C. 6324(a)	6
California Probate Code Section 793	17

OPINIONS BELOW

The first opinion of the court of appeals, which is reproduced in the appendix commencing at page A-1, was filed May 17, 1983, and is reported in 705 F.2d 1487 (Ninth Cir. 1983). (hereinafter "the first opinion")

The second opinion of the court of appeals, which is reproduced in the appendix, was filed September 10, 1985, and was not published. ("the second opinion")

JURISDICTIONAL GROUNDS

The second opinion of the court of appeals was filed September 10, 1985. Application for rehearing was filed, and the court of appeals denied the petition for rehearing by order filed January 14, 1987. This court has jurisdiction to review the decision of the court of appeals pursuant to 28 USC Section 1254(1).

STATUTORY PROVISIONS

26 U.S.C. Sec. 6323

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors.- The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

....

(g) Refiling of notice - For purposes of this section

(1) GENERAL RULE - Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

....

(3) Required refiling period. - In the case of any notice of lien, the term "required refiling period" means -

(A) the one-year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax, and

(B) the one-year period ending with the expiration of 6 years after the close of the preceeding required refiling period for such notice of lien.

....

26 U.S.C. Sec. 6324

(a) Liens for estate tax - Except as otherwise provided in subsection(c)-

(1) Upon gross estate- Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) Liability of transferees and others - If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives , or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax....

California Probate Code Section 793: Limitations period for recovery of property

No action for the recovery of any property sold by an executor or administrator, on the claim that the sale is void, can be maintained by any heir or other person claiming under the decedent, unless it is commenced within

three years later the settlement of the final account of the executor or administrator, or within three years after the discovery of any fraud upon which the action is based. This limitation shall not apply to minors or others under any legal disability to sue and the time the right of action accrues; but any such person may commence an action at any time within three years after the removal of the disability.

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

MILDRED HESTERMAN, EXECUTRIX OF THE ESTATE OF LEONARD HESTERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Mildred Hesterman, Executrix of the Estate of Leonard Hesterman, deceased, hereby petitions the court to issue a writ of certiorari to review the judgments and opinions of the United States Court of Appeals, Ninth Circuit, entered on September 10, 1985 and on May 17, 1983.

STATEMENT OF THE CASE

1. Relief sought by United States:

Chevron interpled rental payments which it was making to Hesterman for a gas station lease, in response to the United States levy upon Chevron and Hesterman to attempt to collect gift and estate taxes owed by the estates of Katherine and Joseph Bazinett. The United States filed a cross-claim against Hesterman for payments which Hesterman had already received from Chevron.

2. Basis of government's claim:

Katherine and Joseph Bazinett died on September 25, 1970 and May 4, 1971, respectively. On December 4, 1972, the Internal Revenue Service made assessments against both estates for gift taxes, and notices of lien were filed on March 22, 1983. These notices were refiled on July 16, 1979, several months after the expiration of the

period for refiling authorized under 26 USC Section 6323(g)(3)(A).

The IRS sought to recover estate taxes under the special estate tax lien provided for in 26 USC 6324(a), which lien has a ten year life from the date of death of the decedent.

3. Factual Background:

On January 8, 1975, William Bazinett, the sole heir and executor of the Bazinett estates, holding himself out as the owner of leased real property belonging to his parents' estates, entered into an exchange transaction with Leonard Hesterman whereby the real property the subject of the lease was conveyed to Hesterman and the rents were assigned. Bazinett did not get probate court approval of the sale, which fact made the sale voidable under California

law.[1]

Chevron made payments to Hesterman until July 29, 1977, when the I.R.S. served a notice of levy on Hesterman and Chevron. Chevron interpled the rent payments by filing this action on May 18, 1979, and (1) the government filed its cross-claim on September 13, 1979.

4. Proceedings below:

The trial court entered its decision on December 23, 1981, holding (1) the United States was not entitled to recover the interpleded funds on the basis of the asserted liability for gift taxes, because the government was untimely in refiling its notice of tax lien and therefore lost its priority to levy assessments; and the government was

---

[1] In order to set aside the sale, it was required that Bazinett bring an action for recission within a statutorily prescribed three year period. Such an action would require an offer of restoration of the consideration paid. Mr. Bazinett never took any action to rescind the sale.

not entitled to recover its special estate tax lien because it had expired, since more than ten years had passed since the death of the decedent. Judgment was filed in favor of petitioner on December 23, 1981.

The government appealed. The Ninth Circuit Court of Appeals filed its first opinion on May 17, 1983, reversing the judgment without durection.

Upon remand, Hesterman moved for new trial on issues upon which no findings had been made by the trial court because findings on the issues were unnecessary, given the basis of the trial court's decision in favor of petitioner. The trial court denied the motion for new trial, and petitioner appealed a second time. The court of appeals affirmed on September 10, 1985 and petitioner petitioned for re-hearing. After nearly a year and a half, the court of appeals denied petitioner's petition for re-

hearing on January 14, 1987.

During the coures of these proceedings, Mr. Hesterman died and his widow, Mildred Hesterman, was substituted as executrix of his estate.

REASONS FOR GRANTING THE WRIT

I. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER THE SPECIAL ESTATE TAX LIEN IMPOSED BY 26 U.S.C. SECTION 6324(a) AUTOMATICALLY EXPIRES AFTER TEN YEARS IF NOT "SOONER PAID IN FULL", OR WHETHER A "NOTICE OF LEVY", WITHOUT SEIZING THE PROPERTY AND SELLING IT TO PAY THE ESTATE TAX, EXTENDS THE TEN YEAR PERIOD OF THE LIEN SO AS TO PERMIT FORECLOSURE WELL AFTER THE EXPIRATION OF THE TEN YEAR PERIOD

Section 6324(a) provides:

> Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death ...."

In U.S. v. Cleavenger, 517 F.2d 230(7th Cir. 1975), the court held that the "plain language of Section 6324" meant what it said; the lien expires in ten years if not sooner paid in full, regardless of whether action has been

taken to attempt to foreclose it during the ten year period. In that case, the government brought an action to foreclose the lien within the ten year period, but failed to obtain judgment within that period. Just as in our case, the government had not filed its general assessment lien in time.

> The present controversy would not have arisen if the transferee's assessment had been made but it was not and the government, falling back upon the special tax lien, is claiming that the ten year period is not durational but is a period of limitations during which a suit for foreclosure must be filed.

In analyzing the government's position, the court stated:

> Under the government's position, there would be no assurance whatsoever from the passage of time. Suit could be filed for foreclosure within the ninth year after the decedent's death and if the proceedings took the normal leisurely course which tax litigation reaching this court seems sometimes to have as an attribute, the foreclosure, and the life of the now latent lien, could be extended well into the next decade. We have been furnished no persuasive reason for determining that the government does not have

> available more than adequately effective means of estate tax collection by utilization of assessment lien procedures buttressed by the freezing act of the special tax lien, assuming, of course, that the business of collecting the taxes is followed with any type of vigor whatsoever.

The court stated that the statutory lien was analogous to a judgment lien with a definite time limitation, which is not extended by levy of execution. Those statues which create a substantive right unknown to the common law, and in which time is made an inherent element of the right so created, are not statutes of limitation.

The Ninth Circuit Court of Appeal, in its first opinion, stated:

> The issue is whether the government is entitled to enforce its special estate tax lien in this manner (by giving notice of levy), as well as through the judicial proceedings contemplated by the district court (Cleavenger court).

Yet the court declined to decide the question! After stating the issue, the court cited Phelps v. United States, 421 U.S. 330 (1975), for the proposition that a tax levy is equivalent to a

seizure which reduces the property to the "constructive possession" of the government. The court then acknowledged that petitioner's argument that, even after a levy, the person levied upon remains the owner of the property and has rights which are inconsistent with the government's position that levy completes the foreclosure.

> Nevertheless, we do not decide the question because William Bazinett did not convey to Hesterman a purchaser's right of ownership. The sale of the gas station and assignment of the lease were invalid because Bazinett failed to obtain the probate court's approval of the transaction.

Therefore, it held, "The sale to Hesterman could not prevent the government from effectively foreclosing upon its lien through levy."

Although the court appears to duck the issue, it is apparent that the court considered that the levy "affectively foreclosed the lien", apparently relying on Phelps v. United States 421 U.S. 330

(1975).

The Phelps rationale was effectively overruled by this court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), decided after the first opinion in this case. Whiting Pools held that a levy does not foreclose the lien; it is merely a special procedural device to protect the lien, analogous to remedies available to secured creditors. It does not "determine the service's right to the seized property"; therefore the levy does not complete the foreclosure process. Until that happens, the debtor is still the owner of the property. The court adopted the position of the second circuit in U.S. v. Whiting Pools, Inc. 674 F.2d 144 (2nd Circuit 1982) in which the court stated "Ownership is extinguished not by the levy but only by subsequent sale."

In its second decision, in response

to petitioner's citation of Whiting Pools, the Ninth Circuit Court of Appeals again declined to decide the issue, stating that the Whiting Pools case "has no relevance to the instant case."

It must be noted that, by the plain language of Section 6324(a), the lien expires after ten years even as against the estate and the heirs, beneficiaries, trustees, and transferees of the estate, all of whom are personally liable for the tax. Therefore, the effect of this published opinion is to hold that the I.R.S. may foreclose a lien years after the expiration of the ten year life of the lien, without any time limitations whatsoever. That conclusion is compelled because, if the conveyance to Hesterman was "invalid" or "void", as the court treats it, the property belongs to the Bazinett estates, and the IRS is foreclosing against the estate

well after the lien of the property expired. It matters not from whom they are taking the property! The issue is, can they enforce a lien which has expired?

Since the lien was not paid within the ten year period, it ceases to exist, regardless of who owns the property. If the action to foreclose the levy is filed within the ten year period, and the ten year period ends while the case is still pending, the case must be dismissed. U.S. v. Cleavenger, supra.

A writ should be granted to review the decision which is direct conflict with the Cleavenger case, supra, and the language of the statute, and entirely ignores the decisive effect of this court's Whiting decision.

II. THE COURT SHOULD ISSUE A WRIT TO DETERMINE WHETHER LEVY BY THE I.R.S. ABROGATES THE NEED TO REFILE A GIFT TAX LIEN, PRIOR TO THE EXPIRATION OF THE SIX YEAR PERIOD PROVIDED FOR IN 26 USC SECTION 6323(g)(3)(A), IN ORDER TO MAINTAIN PRIORITY.

Section 6323(a) provides that a tax lien is not valid against a purchaser until notice thereof has been filed. Subsection (g)(3)(A) provides for refiling of notice after six years. The effect of not refiling, under subsection (g)(1), is to lose the priority established by the first filing. Failure to refile in time "nullifies the effect of the prior filing of the notice of the tax lien." Senate Report Number 1708, 89th Congress, Second Session, reprinted in 1966 USC Congress and Ad News 3222, 3733. The government concededly failed to refile in time. The court of appeal, in its first opinion, concluded that

> The untimely refiling was immaterial because the I.R.S. attempted to collect the taxes by levy during the life of the initial lien and issued its notice of levy "within six years after the assessment of tax period"

The court based its conclusion on American Acceptance Corp. v. Glendora

Better Builders, Inc., 55 F.2d 1220 (9th Cir. 1977):

> "We held that since the levy operated as a seizure, there was no need for the government to maintain a security interest through a lien."

American Acceptance Corporation based its conclusion on the Phelps case, the continued viability of which is seriously undermined by Whiting Pools, supra. Whiting Pools, holds that the levy did not operate as a seizure, and at the most gives the government security for its lien. As stated, the Court of Appeals refused to consider the effect of Whiting Pools in its second opinion.

III. THE COURT SHOULD GRANT REVIEWTO CONSIDER THE SERIOUS IMPLICATIONOF THE COURT OF APPEALS DECISIONS,WHICH HOLD THAT THE GOVERNMENT CANTAKE PROPERTY IN THE POSSESSION OF A PURCHASER, TO ENFORCE A LIEN AGAINSTTHE PURCHASER'S TRANSFEROR, WITHOUT SUFFICIENTLY PERFECTING ITS TAX LIENS,SO LONG AS THE PURCHASER WHO IS IN POSSESSION OF THE PROPERTY HAS A VOIDABLE TITLE, BECAUSE, IN THAT EVENT, THE PURCHASER IS "NOT ENTITLED TO CHALLENGE THE GOVERNMENT'S SUPERIOR INTEREST."

In its second opinion, the Court of Appeals stated that "Hesterman's interest in the property could not defeat the United States tax liens, regardless of defects in their filing or the notices of levy." (Emphasis added)

> In the prior decision, this Court expressly held that, since Hesterman did not hold good title to the transferred property, it was not necessary to decide the question of whether the government had taken sufficient steps to perfect its tax liens. id. at 1290. The Supreme Court's decision therefore has no relevance to the instant case. It was not necessary for the government to acquire an ownership interest in the property in order for it to defeat Hesterman's claim, since Hesterman, having purchased the property from the executor of an estate without the requisite approval, was not entitled to challenge the government's superior interest.

This is a novel proposition of constitutional proportions. It is tantamount to saying that it doesn't matter whether the statute of limitations has elapsed, whether the liens asserted by the government have

expired, or whether collection efforts undertaken by the I.R.S. properly followed the prerequisites under the code, because the government can take money any way they can get it, as long as there is no one around who is "entitled to challenge the government's superior interest." (Second Opinion p.6)

Under well-defined concepts of property law, the primary indicia of ownership of personal property is possession of it. Under basic precepts of due process, anyone in possession of property, no matter how they acquired that possession, has standing and a right to be heard concerning that property before it is taken away from him.

IV. REVIEW SHOULD BE GRANTED IN ORDER TO CORRECT FUNDAMENTAL ERRORS IN THE COURT OF APPEALS' DECISION WHICH MAKES FOR A VERY BAD PRECEDENT.

The Court of Appeals treats Hesterman

as if he had no recognizable property interest. Not only does this ignore common law concepts of property law previously eluded to, but it also ignores California law, which, under Probate Code Section 793, imposes a three year statute of limitations for an action to set aside a conveyance on the basis that the sale is void because made without probate court approval. That three year statute long since expired, well before trial was had in the action. Furthermore, because Mr. Bazinett accepted good consideration for the property and held himself out as its owner, he would be estopped to set aside the sale under California law. For these reasons, the sale is not even voidable any longer.

The court of appeal considered these issues and held that these principles had no application, because the government cannot be estopped or bound

by the state statute of limitations. This conclusion illustrates the inadequacy of the court's consideration of this case. Respondent is not asserting estoppel or the bar of the statute of limitations against the government; it is asserting that Bazinett has no further interest in the property and cannot recover it from Hesterman, and that the government's irterest, being derivative from Bazinett, can rise no higher than the taxpayer's rights. In re Swan-Finch Oil Corp. (DC N.Y. 1967) 279 F.Supp. 386. If the government couldn't take the property from Bazinett it cannot from Hesterman.

VI. CONCLUSION

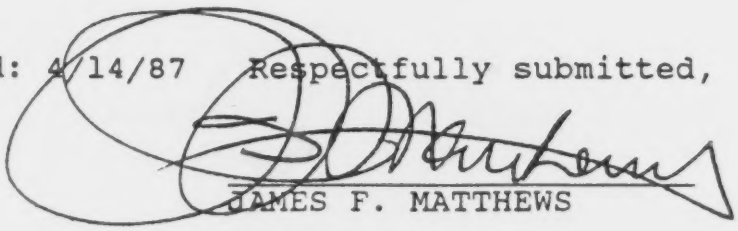
Under the rationale of the published opinion of the court of appeal, the statutory provision limiting the life of the special estate tax lien is inapplicable whenever the I.R.S. levies

within the ten year period, regardless of what they do thereafter. Under this rationale, the government could enforce the special estate tax lien against the widow or heirs of the estate fifteen years after the death of the decedent, as in the instant case, or indeed, twenty-five or thirty-five years after the date of death! This could lead to ridiculous and unfair results. The language of the statute is clear that the duration of the lien is only ten years, regardless of who they are seeking to enforce the line against.

Perhaps the more dangerous precedent set by the published opinion is the precident that the government can take property in the possession of someone without adhering to statutory provisions regarding the collection of taxes, and that someone cannot raise defenses concerning the validity of the procedures followed by the IRS if they

have acquired title by some means which is conceivably voidable. The I.R.S. is powerful, but not that powerful.

Dated: 4/14/87 Respectfully submitted,



JAMES F. MATTHEWS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHEVRON U.S.A., Inc.

Plaintiff

vs.

UNITED STATES OF AMERICA, ET AL

Defendants.

_____/

CA No 82-4090

DC No C-79-1349 WAI

UNITED STATES OF AMERICA,

Cross-complainant/ Appellant,

vs.

LEONARD HESTERMAN,

Cross-claimant/ Defendant/Appellee.

_____/

OPINION

Appeal from the United States District Court for the Northern District of California
William A. Ingram, District Judge, Presiding
Argued and submitted February 15, 1983

Before: GOODWIN, TANG, and FARRIS, Circuit Judges.

FARRIS, Circuit Judge:

The United States claims rental income from a gas station leased to Chevron U.S.A., Inc., in satisfaction of gift and estate taxes owed by the estates of Catherine and Joseph Bazinett. Leonard Hesterman purchased the property and the right to payments under the lease from William Bazinett, the executor of both estates. On May 18, 1979, Chevron instituted this interpleader action in California Superior Court to determine whether the United States or Hesterman was entitled to accrued rental payments totaling approximately $25,000.00. The government removed the action to federal district court pursuant to 28 U.S.C. Section 1444 and filed a cross-claim against Hesterman for an accounting and for

$18,541.39 which Hesterman had already received from Chevron. The district court ruled that the government had no right to income generated by the property under its general lien for gift taxes pursuant to 26 U.S.C. Section 6321 1/ or its special estate tax lien deriving from 26 U.S.C. Section 6324(a)(1).2/ We reverse.

FACTS

William Bazinett is the sole heir and executor of the estates of his parents, Catherine and Joseph, who died on September 25, 1970, and May 4, 1971, respectively. On December 4, 1972, the Internal Revenue Service made assessments against both estates for gift taxes. Notices of lien were filed on March 22, 1973. These notices were refiled on July 16, 1979, several months after the expiration of the period for refiling authorized under 26 U.S.C. Section 6323(g)(3)(A).3/ The Internal

Revenue Service also assessed estate taxes against the two estates in the spring of 1975.

A gas station located in Calaveras County was an asset of both estates. In 1971, William Bazinett filed a petition on behalf of each estate with the probate court requesting permission to lease the gas station to Standard Oil of California, Inc., Chevron's predecessor in interest. The court granted both petitions. In July, 1974, upon gaining the approval of the probate court, William executed a deed of trust and assignment of rents from the gas station in favor of the United States to secure payment of $47,206.22 in gift taxes owed by the two estates. In return the government agreed to forbear from foreclosing on the two liens effective against the property as a result of the gift tax liabilities. On January 8, 1975,

William conveyed the property to Hesterman along with an assignment of the rights of each estate under the lease agreement. William did not obtain the consent of the probate court for either part of this transaction.

Standard Oil began to make payments to Hesterman which continued until July 29, 1977, when the government notified the company of its conflicting claim. On that date Hesterman received a notice of levy and demand for payment of government funds in his hands belonging to the Bazinett estates. Hesterman responded to the notice by advising the government that he did not have in his possession any assets belonging to the subject estates. On September 8, 1977, the government served Hesterman with a final demand for the estate of Catherine Bazinett. Service of a final demand for Joseph's estate, together with additional notices of

levy for both estates, occurred on October 28, 1977.

ANALYSIS

1. Enforcement of the government's lien to recover gift taxes. Section 6331(a) of the Internal Revenue Code provides that the government may collect funds from any person liable to pay taxes "by levy upon all property and rights to property . . . belonging to such person or which there is a lien provided in this chapter for payment of such tax." There would be no question concerning the government's right to the rental payments had it refiled its notices of lien within the statutory time limit. The consequence of untimely refiling is that the notice of lien is treated as originally filed on the date of refiling. 26 U.S.C. Section 5323(g)(1). While this does not affect a lien's validity, "it nullifies the effect of the prior filing of the notice of

the tax lien." S. Rep. No. 1708, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3722, 3733. Here the district court concluded that as a result of the late refiling the government lost its priority position with respect to Hesterman whom the court deemed a bona fide bargain purchaser pursuant to 26 U.S.C. Section 6323(a).4/ We disagree. The untimely refiling was immaterial because the IRS attempted to collect the taxes by levy during the life of the initial lien and issued its notice of levy "within 6 years after the assessment of the tax." 26 U.S.C. Section 6502(a)(1).

In American Acceptance Corp. v. Glendora Better Builders, Inc., 550 F.2d 1220 (9th Cir. 1977), the government served notices of levy upon a taxpayer's employer in 1970, 1971, 1972, and 1973 based upon a lien for uncollected taxes filed in 1968. The

employer made no response. In 1972 the government mistakenly released the lien. Before it could revoke the release, American Acceptance served the employer with a writ to garnish $27,000.00 in wages owed the taxpayer. We held that since the levy operated as a seizure, there was no need for the government to maintain a security interest through a lien. The government's rights were thus unaffected by the subsequent release of the lien. Id. at 1223. Here the government's position is even stronger. Hesterman obtained the property while the March 1973 lien for gift taxes was still in effect. He had notice of the IRS lien when he purchased the gas station and was in possession of property in which the government had a valid security interest when the levy was made.

2. Enforcement of the government's lien to recover estate taxes. The district court

ruled that the government had no claim for estate taxes under the special tax lien provided in 26 U.S.C. Section 6324. This lien against the property in the estate attaches upon the death of a decedent without the filing of a notice of lien and continues for ten years. See Detroit Bank v. United States, 317 U.S. 329, 335 (1943). Relying upon United States v. Cleavinger, 325 F. Supp. 871 (N.D. Ind. 1971), aff'd, 517 F.2d 230 (7th Cir. 1975), the district court found that the government's lien against both estates had lapse since the Internal Revenue Service failed to obtain a judgment foreclosing on the lien within the statutory time limit. The Cleavinger court held that the ten year period specified i 26 U.S.C. Section 6324(a)(1) constituted the duration of the special estate tax lien and not a period of limitations tolled by the filing of a suit to enforce the lien in

district court. 325 F. Supp. at 874-76. Here, however, the government gave notice of levy and made a demand for payment pursuant to U.S.C. Section 6331(a) in July 1977, well before the liens against either estate lapsed. The issue is whether the government is entitled to enforce its special estate tax lien in this manner, as well as through the judicial proceedings contemplated by the district court.

In Phelps v. United States, 421 U.S. 330 (1975), the Supreme Court ruled that a tax levy creates a "custodial relationship" between the holder of the subject property and the United States, reducing the property to the "constructive possession" of the government. Id. at 334. The Court declared that "notice of levy and demand are equivalent to seizure." Id. at 337; see Matter of Pittsburgh Penguins Partners, 598 F.2d 1299, 1302 (3d Cir. 1979); American

Acceptance Corp. v. Glendora Better Builders, Inc. 550 F.2d 1220, 1222 (9th Cir. 1977).

Hesterman seeks to limit the statements in Phelps by asserting that they relate only to the bankruptcy court's summary jurisdiction powers and not ownership rights. He distinguishes American Acceptance on the ground that our holding in that case related solely to the effect of the government's levy on the claims of a competing lienholder. Hesterman points to several rights which an owner possesses following a tax levy which are inconsistent with the government's position that its notice of levy is sufficient to perfect its lien against a purchaser of property.5/ His argument is not without force. Compare United States v. Whiting Pools, Inc., 674 F.2d 144, 156-60 (2d Cir. 1982), cert. granted, 103 S. Ct. 442 (1982), with Phelps,

421 U.S. at 337 & n.8, and Cross Electric Co. v. United States, 664 F.2d 1218 (4th Cir. 1981). Nevertheless, we do not decide the question because William Bazinett did not convey to Hesterman a purchaser's right of ownership. The sale of the gas station and assignment of the lease were invalid because Bazinett failed to obtain the probate court's approval of the transaction.

Section 755 of the California Probate Code states in relevant part: "Except as provided by Sections 770, 771 and 772, all sales of property shall be reported to the court and confirmed by the court before title to the property passes. ..." Neither the real property itself nor the lease qualify for the statutory exemptions to the confirmation requirement given to perishable property or other personal property which will depreciate if not disposed of rapidly, Cal. Prob. Code Section 770; securities,

Cal. Prob. Code Section 771; or tangible personal property sold at public sale, Cal. Prob. Code Section 772.

The district court cited In re Estate of Spirtos, 34 Cal. App.3d 479, 109 Cal. Rptr. 919 (2nd Dist. 1973), and In re Hilde's Estate, 112 Cal. App.2d 189, 246 P.2d 79 (2d Dist. 1952), for the proposition that the only effect of failure to obtain confirmation of a sale is to surcharge the executor. However, in neither of these cases were the sales challenged by a party claiming a superior interest in the transferred property.

The plain language of Section 755 indicates that a sale of property is not valid unless authorized by the probate court. California case law supports this reading. In East Coalinga Oil Fields Corp. v. Robinson, 86 Cal. App.2d 153, 194 P.2d 554 (3d Dist. 1948), the executrix of an

estate assigned shares of stock without a court order under Cal. Prob. Code Section 771 or confirmation under Cal. Prob. Code Section 755. Ruling the sale void, the court held that where the shares were in the name of the deceased there was no title vested in the purchaser as against the estate. Id. at 158, 194 P.2d at 557. Hesterman claims that his case is distinguishable because William Bazinett transferred record title from the estate to himself and caused the rental payments to be paid to him personally rather than in his capacity as executor. He relies upon language in the East Coalinga opinion indicating that if the executrix had been the apparent owner of the stock certificates, she could have transferred title to an innocent purchaser. However, the California court qualified its decision only because of the need to preserve the

negotiability of stock certificates. Id. Having purchased real property and the right to rental payments from the executor of an estate, Hesterman is charged with notice that no title would pass until the probate court confirmed the sale. Hesterman "cannot now plead ignorance and good faith when the slightest investigation would have dispelled any ignorance thereof." Id. at 158-159, 194 P.2d at 557. Further, California cases indicate that the manifest purpose of having the probate court supervise sales of property is to protect creditors of an estate from abuse of executorial discretion. See Estate of Patterson, 108 Cal. App.3d 197, 206, 166 Cal. Rptr. 435, 441 (1st Dist. 1980); In re Estate of Quackenbush, 53 Cal. App.3d 751, 755, 125 Cal. Rptr. 832, 835 (4th Dist. 1975). The sale to Hesterman could not prevent the government from effectively foreclosing upon its lien

through levy.

Hesterman contests the ability of the government to challenge the validity of the transaction at this point, but his arguments lack merit. The government is not bound by state statutes of limitations or laches in enforcing its rights. United States v. Summerlin, 310 U.S. 414, 416 (1940); United States v. First National Bank, 652 F.2d 882, 890 (9th Cir. 1981); United States v. Weintraub, 613 F.2d 612, 618-619 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980). Nor should the government, which played no role in the transfer of the disputed property, be estopped from arguing that the sale was void. See Simon v. Califano, F.2d 121, 123 (9th Cir. 1979).

Finally, Hesterman argues that the government cannot enforce its special estate tax lien against the estate of Joseph Bazinett because its assessment for estate

taxes was not made within three years after the return was filed pursuant to 26 U.S.C. Section 6501(a). However, that section has no bearing on the government's enforcement of the lien provided by section 6324(a)(1). We recently stated: "It is clear that a special estate tax lien attaches at the time of decedent's death without necessity for assessment or demand ...." United States v. Vohland, 675 F.2d 1071, 1074 (9th Cir. 1982) (citing Detroit Bank, 317 U.S. at 332).

REVERSED.

FOOTNOTES

1/26 U.S.C. Section 6321 states:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2/26 U.S.C. Section 6324(a)(1) provides:

> Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

3/ 26 U.S.C. Section 6323(g)(3) reads in part as follows:

> In the case of any notice of lien, the term "required refiling period" means --
>
> > (A) The one-year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax....

4/ 26 U.S.C. Section 6323(a) states in relevant part: "The lien imposed by section 6321 shall not be valid against any purchaser ... until notice thereof which meets the requirement of subsection (f) has been filed by Secretary or his delegate."

5/ The indicia of ownership Hesterman enumerates are:

> The right to receive notice of the seizure and notice of the impending sale of the property pursuant to 26 U.S.C. Section 6335; the right granted by 26 U.S.C. Section 6337(a) to pay any sum due to the IRS before sale and retain ownership of the property; the ability under 26 U.S.C Section 6337(b) to redeem

the property within 120 days of the sale; and the right under 26 U.S.C. Section 6342 to receive any surplus remaining after the cost of the sale and the sum due the IRS have been subtracted from the proceeds of the sale.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHEVRON, U.S.A., INC.,	)	NO. 84-2014
	)	DC NO. C-79-1349
Plaintiff,	)	
v.	)	MEMORANDUM*
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Cross-Claimant, Appellee,	)	
v.	)	
ESTATE OF LEONARD HESTERMAN,	)	
Appellant.	)	

Appeal from the United States District Court for the Northern District for California
Hon. William A. Ingram, U.S. District Judge, Presiding

Argued and submitted April 9, 1985
San Francisco, California

Before: CANBY and NORRIS, Circuit Judges; and HUPP,** District Judge

This is the second appeal in this case. In Chevron, U.S.A., Inc. v. United States of America, 705 F.2d 1487 (9th Cir. 1983), (hereafter "the prior opinion") another panel of this Court held that Hesterman*** was not a bona fide bargain purchaser of the estate for purposes of 26 U.S.C. Sec. 6323(a) because the sale had not been approved

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The Honorable Harry L. Hupp, United States District Judge for the Central District of California, sitting by designation.

*** Leonard Hesterman died on December 25, 1982, before the first appeal was decided. By Order of the District Court, his estate was substituted as a party to the suit. For convenience, however, we refer to appellant as Hesterman.

by the probate court. Id. at 1489. Therefore, the panel held, Hesterman's interest in the property could not defeat the United States' tax liens, regardless of defects in their filing or the notices of levy. Id. at 1491. The panel reversed the District Court's judgment in favor of Hesterman, but did not give a mandate providing instructions for further conduct of the case. The factors supporting reversal are stated in the prior opinion and need not be re-stated here.

The government thereafter filed a motion for entry of judgment in its favor. The District Court granted the motion for judgment, denied Hesterman's motion to amend the judgment and for a new trial, and entered judgment for the government. The District Court's Order awarded the

government Chevron's interpleaded rent payments and future rental payments from the property up to the amount of its tax liens, and imposed personal liability upon Hesterman for all rental income he had received before Chevron filed its interpleader action. We affirm on the ground that the prior opinion determined all litigable issues.

DISCUSSION

The prior opinion of this Court established the law of the case, and the explicit and implicit holdings in that decision governed the disposition of the government's motion for entry of judgment. In the Matter of Beverly Hills Bancorp, 752 F.2d 1334, 1337 (9th Cir. 1984). The prior opinion determined that Hesterman was not a bona fide purchaser of the property, and that the sale to him "could not

prevent the government from effectively foreclosing upon its liens through levy." Id. at 1491. Hence, the law of the case required the district court to enforce the liens by awarding the interpleaded rent payments to the government, rather than to Hesterman. In addition, it was implicit in the Court's decision that Hesterman had been obligated to honor the government's levy. Therefore, the district court did not err in imposing liability upon Hesterman for income he had received from the estate property to the extent that the tax liens could not be satisfied from the interpleaded rent payments. 26 U.S.C. Sec. 6331(a). Further, the disposition of the appeal in the prior opinion barred Hesterman from challenging the validity of the tax liens by a motion for new trial or

amended judgment.

Hesterman first contends that the reversal without instructions in the prior opinion mandates by implication the granting of a new trial. We disagree for the reason that the prior opinion decided all of the issues in the case. See 6A MOORE, MOORE'S FEDERAL PRACTICE para. 59.16 (2d ed. 1984), and cases cited at n. 1 (" . . . the appellate decree constitutes the law of the case; and the trial court must carry it into execution, according to the mandate."). Accordingly, the trial court was free to enter judgment, having correctly determined that there were no undetermined issues.

Hesterman contends that he was entitled to a new trial because the trial court, which originally had found in his favor, had failed to make

any findings on the effectiveness of the government's levies and the validity of its tax liens. However, in the prior opinion, this Court ruled either explicitly or implicitly against Hesterman on each of the challenges to validity he raised in his motion for new trial. There was no need for the district court to grant a new trial on validity of the tax liens since their enforceability was implicit in the decision that Hesterman could not prevent their enforcement.

Hesterman further contends that, even though this Court held that the government could not be estopped from arguing that Bazinett's sale to Hesterman was void, the district court erred in failing to consider whether the government, as a creditor of the estate, was bound by an estoppel against

Bazinett to deny the validity of Bazinett's sale. However, as the prior opinion noted, the rule in this circuit is that estoppel is available against the government in its sovereign capacity only where its conduct may properly be called "affirmative misconduct." Id. at 1491, citing Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979). Since, as the prior opinion noted, the government has "played no role in the transfer of the estate property," (Id.) no affirmative misconduct could be present. Absent affirmative misconduct, estoppel would not be available against the government even as a creditor of the estate.

Hesterman also contends that when it entered judgment for the government, the trial court erred in failing to consider the effect of the Supreme

Court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), a case which was decided after the prior opinion in this case had been issued. In Whiting Pools, the Supreme Court addressed the question whether the IRS was entitled to withhold from the bankruptcy trustee property upon which it had levied prior to a debtor's filing of a petition in bankruptcy. In that case, the Supreme Court held that the government's levy cannot place the government in a position superior to that of other secured creditors who are subject to the turnover requirements of Section 542(a) of the Bankruptcy Reform Act of 1978 because ownership of the seized property is transferred from the debtor only when the property is sold to a bona fide purchaser.

Hesterman urges that in light of the Supreme Court's characterization of an IRS levy as conferring merely legal custody in Whiting Pools, this Court must now re-characterize the government's special estate tax lien and hold that, since the government never acquired title to the property during the life of the lien, the lien had ceased to exist by the time judgment was entered for the government. 26 U.S.C. Sec. 6324(a)(1). He further contends that the government's failure to timely re-file its notice of gift tax liens was similarly fatal to its security interest. However, the Whiting Pools case did not involve a question of priority between two competing claimants, like those here, each of whom claims a superior interest in the property. In the

prior decision, this Court expressly held that, since Hesterman did not hold good title to the transferred property, it was not necessary to decide the question of whether the government had taken sufficient steps to perfect its tax liens. Id. at 1490. The Supreme Court's decision therefore has no relevance to the instant case. It was not necessary for the government to acquire an ownership interest in the property in order for it to defeat Hesterman's claim, since Hesterman, having purchased the property from the executor of an estate without the requisite approval, was not entitled to challenge the government's superior interest.

AFFIRMED.